



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**MISC. APPLICATION NO. 535 OF 2018**

**IN THE MATTER OF THE APPLICATION BY TALEWA ROAD CONTRACTORS LIMITED FOR THE RECOGNITION AND ENFORCEMENT OF AN ARBITRAL AWARD**

**AND**

**IN THE MATTER OF THE ARBITRATION ACT, 1995**

**BETWEEN**

**TALEWA ROAD CONTRACTORS.....APPLICANT/RESPONDENT**

**-VERSUS-**

**KENYA NATIONAL HIGHWAYS AUTHORITY.....RESPONDENT/APPLICANT**

**RULING**

The Respondent/Applicant (herein “**Kenya National Highways Authority**”) by a Certificate of Urgency dated 17<sup>th</sup> December 2019, filed together with a Notice of Motion urged the Court to hear and determine their matter instantly on grounds;

- a) That on 15<sup>th</sup> November 2019, the Honourable Court delivered a Ruling on the Application by Talewa Roads Contractors Limited (hereinafter “Talewa”) seeking recognition and enforcement of the arbitral award published by the sole arbitrator Eng. Paul Thang’a Gichuhi in Arbitration proceedings between Talewa and Kenya National Highways Authority (hereinafter “the Respondent/Applicant or KeNHA”) and made final orders on 9<sup>th</sup> December 2019 for recognition and enforcement of the arbitral award.
- b) That Talewa surreptitiously and without following the prescribed procedure for preparation of decrees and orders obtained a purported decree and warrants of attachments in respect of the recognition and enforcement of the impugned Arbitral Award with the aim of irregularly attaching the Respondent/Applicant’s property in purported satisfaction of the Arbitral Award. Talewa has also failed to apply for leave to enforce the award as a decree pursuant to rule 6 of the Arbitration Rules, 1997.
- c) That Talewa’s acts are irregular and contrary to the express provisions of section 68(a) of the Kenya Roads Act No. 2 of 2007 which prohibits execution or attachment or any process in similar nature against the Authority or against its property in satisfaction of a Judgment or order against the Authority.
- d) That in making the final orders for recognition and enforcement of the arbitral award on 9<sup>th</sup> December 2019 this Court directed that if any party has any issue with regard to the process and outcome of the matter, the party shall move the court appropriately.
- e) That the Respondent/Applicant is Aggrieved by the Ruling of this Court delivered on 15<sup>th</sup> November 2019 as well as the orders for recognition and enforcement of the Arbitral award made on 9<sup>th</sup> December 2019 and therefore applies for review pursuant to **rule 11 of the Arbitration Rules, 1997** as read with **Order 45 Rule 1 of the Civil Procedure Rules**.
- f) That the Application for review is based on “sufficient reasons” advanced on the Application and Supporting Affidavit herein.
- g) That the Applicant/Respondent has instructed Bemac Auctioneers who have already proclaimed the Respondent/Applicant’s property and will imminently continue to act unlawfully and irregularly by auctioning the Respondent/Applicant’s property in purported execution of the decree herein unless this Court intervenes and grants stay of execution pending hearing and determination of this Application.

h) That the instant application will be rendered nugatory unless the Court intervenes as sought herein and grants stay of any execution of the decree pending hearing and determination of this application

i) That the Respondent/Applicant application for review has been brought timeously and without unreasonable delay and in interest of justice, pursuant to **Order 45 Rule 5 of the Civil Procedure Rules** this Court ought to re-hear *de novo* the Chamber summons application dated 18<sup>th</sup> December 2018 for recognition and enforcement of the Arbitral Award and/or make such orders as to the re-hearing of the Chamber Summons application as the Court deems fit and just.

In the Notice of Motion pursuant to **Rule 11 of the Arbitration Rules, 1997, Order 22 Rule 22(1), order 45, rule 1 of the Civil Procedure Rules, 2010** and all enabling provisions of the law, the Respondent/Applicant sought for orders that;

a) The execution of the decree issued on 13<sup>th</sup> December 2019 and/or order issued on 13<sup>th</sup> December 2019 and all consequential processes arising therefrom be stayed, suspended and/or lifted pending the hearing and determination of this application.

b) In the alternative, the purported enforcement of the Arbitral Award published by Eng. P. T. Gichuhi and all consequential processes arising therefrom be stayed, suspended and/or lifted pending hearing and determination of **Civil Appeal No. 246 of 2019; Talewa Road Contractors Limited vs Kenya National Highways Authority** challenging the finality of the said Arbitral Award.

c) This Court reviews, varies and/or sets aside the entire Ruling dated and delivered on 15<sup>th</sup> November 2019 and the consequential orders for recognition and enforcement made on 9<sup>th</sup> December 2019 together with all consequential processes arising therefrom.

d) Pursuant to **Order 45 Rule 5 of the Civil Procedure Rules** this Court re-hears *de novo* the Chamber Summons application dated 18<sup>th</sup> December 2018 for recognition and enforcement of the Arbitral Award and/or make such orders as to the re-hearing of the Chamber Summons application as the Court deems fit and just.

In the supporting Affidavit of Jessica Mbae a Senior Legal Officer of the Respondent Applicant herein, she averred that in the Ruling delivered on 15<sup>th</sup> November 2019 the Court inter alia directed the Applicant/ Respondent to file the original Arbitral Award whereupon the court would proceed to make final orders for recognition and enforcement of the Arbitral Award.

That on 9<sup>th</sup> December 2019 the Court made final orders for recognition and enforcement of the Arbitral Award but directed that if any party has any issue with regard to the process and outcome of the matter, the party shall move the court appropriately.

She stated that following the above orders of 9<sup>th</sup> December 2019, Telewa, through its advocates, wrote a letter dated 9<sup>th</sup> December 2019 to the Director General of the Respondent/Applicant demanding payment of the entire decretal sum within 48 hours failing which they would proceed with execution.

That the Respondent/Applicant only learned on 17<sup>th</sup> December 2019, upon written request to the Deputy Registrar for copies of the decree, and following an attempted proclamation of attachment against the property of the Respondent/Applicant, that a purported decree dated 13<sup>th</sup> December 2019 had already been obtained by Telewa. Marked **JM-03 ID** a copy of the letter from the Respondent/Applicant's advocates requesting copies of the decree and the order.

She stated that Telewa has fatally failed to apply for leave to enforce the Award as a decree pursuant to **rule 6 of the Arbitration Rules, 1997** and has therefore acted and continues to act unlawfully and irregularly.

That **Section 68 (a) of the Kenya Roads Act No. 2 of 2007** prohibits execution or attachment or any process in similar nature against the Authority or against its property in satisfaction of Judgment or order against the Authority in the following terms:

*“Notwithstanding anything to the contrary in any law:-*

*Where any judgment or order has been obtained against an Authority, no execution or attachment, or process in the nature thereof, shall be issued against such Authority or against its property, but the Director General shall, without delay, cause to be paid out of the revenue of the Authority such amounts as may, by the judgment or order, be awarded against the Authority.”*

Further to the above, The Respondent/Applicant is aggrieved by the Hon Court's Ruling delivered on 15<sup>th</sup> November, 2019 as well as orders for recognition and enforcement of the Arbitral award made on 9<sup>th</sup> December 2019 and therefore applies for Review pursuant to **Rule 11 of Arbitration Rules, 1997** as read with **Order 45 Rule 1 of CPR**.

Therefore, in the interest of justice and pursuant to **Order 45 Rule 5 of CPR**, the Court ought to rehear *de novo* the Chamber Summons Application of 18<sup>th</sup> December 2018 for recognition and enforcement of the Arbitral award/and/or make such orders as to rehearing of the Chamber Summons Application as the Court deems fit.

On 20<sup>th</sup> December 2019, the Duty Court granted the Applicant orders to setting aside the proclamation based on the decree by Auctioneers pending further orders of the Trial Court.

## **RESPONDENT'S GROUNDS OF OPPOSITION**

The Applicant/Respondent opposed the application by Grounds of Opposition filed on 19<sup>th</sup> December 2019, on the following grounds;

- a) That the Respondent/Applicant filed a Notice of Appeal on 29<sup>th</sup> November 2019 seeking to appeal against the ruling delivered on 15<sup>th</sup> November 2019. To the extent that the application is for review, the same is misconceived as it offends the provisions of Order 45 Rule 1 which provides that a party cannot appeal and apply for review simultaneously.
- b) That the application and the prayers sought are legally misconceived as are no basis for review of the ruling have been demonstrated.
- c) That the pendency of an appeal by Talewa Road Construction Limited which was in respect of an amount not awarded by the Arbitral Tribunal cannot be used as a basis for stay of execution of the amount already awarded which amount Kenya National Highways Authority has not applied to set aside.

#### **REPLYING AFFIDAVIT**

The application was further opposed vide a Replying Affidavit of 5<sup>th</sup> February 2020 sworn by John Wainaina, the Managing Director of the Applicant/Respondent. He averred that the present application by KeNHA was filed in bad faith and it is intended to delay the conclusion of this matter for the following reasons;

- 1) The dispute between parties was heard by sole Arbitrator on diverse dates and consequently the award dated 22<sup>nd</sup> March ,2018 was published.
- 2) The Arbitral award dated 22<sup>nd</sup> March 2018 directed KeNHA to pay Talewa the sum of Ksh 115,131,449.99 within a period of 45 days which period lapsed on 8<sup>th</sup> May 2018.
- 3) KeNHA did not file an application in the High Court seeking to set aside the arbitral award and a period of 2 years has since lapsed from the date the said award was published.
- 4) The Deponent's advocate informed the Deponent, that he personally gave Counsel for KeNHA a copy of the filed award while in Court on 25<sup>th</sup> July 2019.
- 5) The deponent was present in Court on 25<sup>th</sup> July 2019 and confirmed he saw both advocates talking before commencement of the hearing and saw them exchange documents in his presence.
- 6) KeNHA filed Notice of Appeal on 29<sup>th</sup> November 2019 seeking to challenge orders of this Court as borne out by a copy of the same marked **JW-A**.
- 7) The Deponent is aware that the Hon sole Arbitrator served Counsel of both parties including Counsel for KeNHA, the Arbitral Award and hence the Counsel for KeNHA has been aware of the award since its publication as borne out by copies marked **JW-B**.
- 8) The present application by KeNHA has been filed in bad faith and is intended to delay the conclusion of this matter for the following reasons;
  - a) KeHNA did not file application to set aside the Arbitral Award within the stipulated period and further a period of about two (2) years had lapsed since the date of publication.
  - b) There is no basis or justification why the arbitral award has not been settled to date.
  - c) The Respondent/Applicant in the present application had filed a Notice of Appeal challenging the decision of this Court but no further steps has been taken in the intended appeal.
  - d) There are no good grounds to warrant review of the orders granted by this Court.
  - e) This Court has a duty to determine disputes expeditiously and in a fair manner without record to technicalities.
  - f) The present application is based or grounded on technicalities and it should not be entertained by this Court.
  - g) The present application is only intended to deny Talewa the fruits of its judgment while clogging this matter.

#### **RESPONDENT/APPLICANT'S SUBMISSIONS**

The Respondent/Applicant relied on **Section 80 of CPA & Order 45 Rule 1(1) (d) CPR 2010** provides the Court jurisdiction to review a matter for any other sufficient reason. This includes any matter analogous to discovery of new and important matter which was not within the knowledge of the Applicant at the time the order was made or mistake or error apparent on the face of the record.

The Applicant referred to the following cases to fortify its position on review;

1) *Victoria Furnitures Ltd vs Zaddock Furniture Systems Ltd [2019] eKLR*

*“The Respondent further argued that, the provisions of Arbitration Act and the Rules do not provide for review proceeding, however I agree with the Applicant’s submissions that the same provisions do not exclude the power of the court to review a decision under Order 45 rules 1 the Civil Procedure Rules. In the same vein section 1 (2), of the Civil Procedure Act, states that: “this Act applies to proceedings in the High Court and, subject to the Magistrate’s Courts Act to proceedings in subordinate courts” I therefore find that the court has the power under the constitutional provisions of Article 165, the statutory provisions of the Civil Procedure Act and Rules and its inherent power to entertain the application herein.*

2) *Goodison Sixty one School Ltd vs Symbion Ky Ltd [2017] eKLR*

*“39. The provisions for review are in Section 80 of the CPA which the applicant cited, and Order 45 Rule 1 CPR which the applicant did not expressly cite. The question that arises is whether, in the absence of any review provision in the Arbitration Act, the CIVIL Procedure Act and Rules apply. As earlier noted, Section 14 (6) OF THE Arbitration Act prohibits an appeal from a decision of the high Court on a challenge to the Arbitrator. ...”*

3) *Fredrick Otieno Outa vs Jared Odoyo Okello & 3 Others [2017] eKLR*

*“The court in Northern India caterers (India) vs Lt. Governor of Delhi identified the circumstances that would justify exercise of review jurisdiction as follows:*

*a) Where the attention of the Court is not drawn to a material statutory provision during the original hearing, the Court will review its judgment. (Gupta Case above)*

*b) Where a manifest wrong has been done and it is necessary to pass an order to do full and effective justice. (O. N. Mahindroo vs Distt. Judge Delhi & Another)*

*c) Where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. (Chandra Kanta vs Sheikh Habib).*

Parties to proceedings filed pleadings and submissions. On 25<sup>th</sup> July 2019 Counsel on behalf of parties proceeded with oral highlighting of written submissions.

Unknown to the Respondent/Applicant KeNHA and its advocates on record, it turned out that the Applicant/Respondent filed in Court a purported Original Arbitral Award on 22<sup>nd</sup> July 2019. This is despite Talewa having averred in the Supplementary Affidavit that it filed a certified copy of the Arbitral Award and the certified copy of Arbitration Agreement in order to comply with the Provisions of **Section 36(3) of the Arbitration Act.**

KeNHA only learnt that the purported Original Arbitral Award was indeed filed on 22<sup>nd</sup> July 2019 when this Court delivered Ruling on 15<sup>th</sup> November 2019 and noted as follows at Pg 9 of its Ruling;

*“The original Final Award was filed in Court on 22<sup>nd</sup> July 2019 and no challenge was raised during the oral highlights of submissions on 25<sup>th</sup> July 2019. Therefore, Section 36(3) (a) of Arbitration Act is complied with...”*

The Applicant contended that service of the Original Arbitral Award as outlined by the Respondent’s Replying Affidavit is not proved by documentary evidence.

The Applicant submitted that the Respondent/Applicant has never been served with the award published on 22<sup>nd</sup> March 2018. As it is; there are 3 versions of the award, the uncertified copy, the certified copy with certain pages unsigned or undated and the original Final Award which the Respondent/Applicant has never seen to date. The Applicant contends which of the 3 versions of the Arbitral Award was published by the Hon Arbitrator on 22<sup>nd</sup> March 2018?

The Respondent/Applicant relied on the case of *Safaricom Limited vs OceanView Beach Hotel limited & 2 Others [2015]* which the Court noted;

*“The Defendants raised an objection relating to the provisions under section 36 that the Plaintiff has failed to file, the original or certified copy of the arbitral award and the original or certified copy of the arbitration agreement. That objection in my view is well taken. I have perused the court file and I was unable to trace the original award or arbitration agreement. Both Section 36(3) of Cap 49 and Rule 4 of the Arbitration Rules require that the original or certified copies of the award and arbitration agreement be filed first before the application for adoption of the award is filed. The Plaintiff failed to so file. That in my view is a breach which cannot lead to the dismissal of the application.(emphasis added)*

The Applicant submitted that the Original Arbitral award was filed contrary to **Rule 4, 5 & 6 of Arbitration Rules** and was filed in error of law. The outlined infractions amount to sufficient reasons and constitute proper basis for reviewing the Ruling of the Court and

consequential orders.

The Respondent submitted that the Court Ruling only took into account whether Talewa had complied with mandatory provisions of **Section 36(3) of Arbitration Act**. The Ruling of the Court failed to consider the issue of the pendency of **Nairobi Civil Appeal No 246 of 2019 Talewa Road Contractors vs Kenya National High Ways Authority** and its impact on Talewa's application for recognition and enforcement of the Arbitral Award.

Accordingly, the Applicant submitted that since this Court failed to address the effect of the pendency of proceedings in **Nairobi Civil Appeal No 246 of 2019** on recognition and enforcement of the Arbitral award and in light of **Section 37 (2) of the Arbitration Act** as read with **Rule 6 of Arbitration Rules 1997**, this constitutes sufficient reason for review of the said Ruling and consequential orders of recognition and enforcement.

#### **APPLICANT/RESPONDENT'S SUBMISSIONS**

The Respondent submitted that the Applicant's application of 17<sup>th</sup> December 2019 cannot be entertained whereas the Applicant did not challenge the Arbitral award and/or file application to set aside the Arbitral award and noting that a period of 2 years elapsed.

The Arbitral award was published on 22<sup>nd</sup> March 2018 by sole Arbitrator and Respondent was directed to pay the awarded sum within 45 days which period elapsed on 6<sup>th</sup> April 2018.

The Respondent opposed the Applicant's application vide the Respondent's Replying Affidavit filed on 5th February 2019.

The Respondent relied on **Rule 6 of Arbitration Rules and Section 35 (3) Arbitration Act** to fortify its position that an application for setting aside the arbitral award may not be made after 3 months have elapsed and if no application to set aside an arbitral award has been filed in accordance with **Section 35 of the Act**, the party filing the award may apply ex parte by summons for leave to enforce the award as a decree.

The Court delivered its Ruling on 15th November 2019 wherein it acknowledged the original arbitral award filed in Court on 22<sup>nd</sup> July 2019 and ordered original Arbitration Agreement be filed and served. On 9th December 2019, the Court granted orders of recognition of Arbitral award.

On 20<sup>th</sup> November, 2019, the Respondent filed Notice of Appeal and also requested for typed proceedings to appeal the Court Ruling of 15th November 2019.

In the case of **Vishva Builders Ltd vs J.K Koskei Civil Suit 102 of 1995** it was held;

***“The deciding factor is whether a party has made an election to proceed on appeal to redress his grievances, once that election is made and it fruitifies it matters not that the appeal filed eventually turns out to be invalid. Once the process of appeal is taken the process of review is shut out.”***

In **ELC MISC APP No 5 of 2018 Serephen Nyasani Menge vs Rispah Onsase** it was noted;

***“A proper reading of section 80 of the Act and Order 45 Rule 1 and 2 makes it abundantly clear that a party cannot apply for review and appeal from the same decree or order.”***

The Respondent reiterated that by virtue of **Section 35 (3) Arbitration Act**, the Applicant did not challenge the substance of the award as the application to set aside the award was not filed within the requisite period, 3 months.

The Respondent also relied on the following provisions to support its position;

**Section 32A Arbitration Act** prescribes Finality in arbitral awards. **Sections 1A, 1B & 3A CPA** provide for just expeditious disposal of disputes.

The threshold for review of the Ruling of 15th November 2019 is not met in terms of the case of **Anne Mumbi Hinga vs Victoria Njoki Gathata (2009) eKLR** that emphasized on **Rule 11 of Arbitration rules and Section 10 of Arbitration Act** that make the Arbitration proceedings under Arbitration Act conclusive as the Act is a complete code.

#### **DETERMINATION**

The Court considered the pleadings and submissions by Counsel and the issues that emerge for determination are;

- a) Should the Court grant a review of its Ruling of 15<sup>th</sup> November 2019?**
- b) Did the Applicant serve the Respondent with the Original Arbitral award filed in court on 22<sup>nd</sup> July 2019?**

**c) Did the Court err in not stopping proceedings culminating to the Ruling of 15<sup>th</sup> November 2019 whilst an appeal had been lodged over the same matter?**

**BACKGROUND**

The parties moved the Court vide application of 5<sup>th</sup> March 2019 to **join** an intended 3<sup>rd</sup> Party. After close of pleadings and submissions by parties through Counsel, the Court delivered Ruling on 17<sup>th</sup> June 2019. The court found that the intended 3<sup>rd</sup> party was involved in another suit separately with the Claimant.

On 25<sup>th</sup> July, 2019, parties moved the Court, the Applicant sought recognition and enforcement of Arbitral award published on 22<sup>nd</sup> March 2018. The Respondent objected through Grounds of opposition to the application as the Final Arbitral Award was not in compliance with **Section 36 (3) of Arbitration Act**. It was not an original or certified copy of Final Arbitral Award.

The Respondent also submitted that the Final Award was not in conformity with **Section 32 (1) & (4) of Arbitration Act** it was not signed and dated on all pages by the sole Arbitrator.

The Applicant relied on **Article 159 2 (d) COK 2010 and Rule 6 of Arbitration Rules** and urged the Court to recognize and enforce Arbitral Award.

On the same day, the Applicant confirmed its Documents on record and included Arbitral Final Award filed on 22<sup>nd</sup> July 2019.

By the Court's Ruling of 15<sup>th</sup> November 2019, it was acknowledged that an original Final Award was filed on 22<sup>nd</sup> July 2019 and no objection was raised by parties. So since it was in order and signed by the Arbitrator as required under **Section 32 of the Arbitration Act** it awaited only the filing original Arbitration Agreement and served as per the Court Ruling of 15<sup>th</sup> November 2019.

On 9<sup>th</sup> December 2019, the Respondent confirmed the Original Arbitration Agreement was filed but contested the service of the Original Arbitral Award filed in Court on 22<sup>nd</sup> July 2019.

On 9<sup>th</sup> December 2019, the Court was to confirm only the filing and service of the Original Arbitration Agreement and not the Original Arbitral Award as it was already in the Court File at the time parties through Counsel submitted on the application for recognition and enforcement of Arbitral Award on 25<sup>th</sup> July 2019.

Therefore, since the Court could not revise the Ruling read out on 15<sup>th</sup> November 2019, on 9<sup>th</sup> December 2019 due to the emerging contention for the 1<sup>st</sup> time between Counsel that the original Arbitral award though filed was or not served, the Court recognized and enforced the Arbitral Award as the condition placed in the said Ruling to have the original arbitration agreement was filed and served.

In light of the Court orders of 9<sup>th</sup> December 2019, this Court granted either party to formally move the Court appropriately.

The Respondent/Applicant herein Filed the instant application seeking review of the Ruling of 15<sup>th</sup> November 2019, setting aside, staying execution of the Ruling and consequential orders and allowing the application be heard *de novo*.

**Can this Court review its Ruling of 15<sup>th</sup> November 2019?**

The Arbitral award was published on 18<sup>th</sup> March 2018. The Respondent did not file an application to set aside the Arbitral award within 3 months as required under **Section 36 (3) of the Arbitration Act**. The Respondent is not contesting the substance/content of Final Arbitral Award but the process of recognition and enforcement of the Award as shown by Grounds of opposition filed on 28<sup>th</sup> February 2018, that the original final Arbitral Award was not served as per the **Rule 4,5,6 of Arbitration Rules**.

During filing of pleadings and submissions which process is conducted in the Commercial & Tax Registry, on 22<sup>nd</sup> July 2019, the Applicant filed the Original Final Arbitral Award. On 25<sup>th</sup> July 2019, during submissions the Applicant referred to the said original Final Arbitral Award as filed as part of the documents they were relying on. The Court found in its Ruling of 15<sup>th</sup> November 2019 that the Applicant complied with **Section 36(3) of the Arbitration Act** partly as the original Final Award was filed on 22<sup>nd</sup> July 2019 and partly had failed to comply as the original Arbitration Agreement was not filed and served. Reading Order 45 Rule 1 CPR and caselaw cited; *Victoria Furnitures Ltd vs Zaddock Furniture Systems Ltd; Goodison Sixty one School Ltd vs Symbion Ky Ltd [2017] Eklr and Fredrick Otieno Outa vs Jared Odoyo Okello & 3 Others (supra)*; unless expressly omitted an applicant may apply for review.

**b) Did the Applicant serve the Respondent with the Original Arbitral award filed in court on 22nd July 2019?**

The Respondent contests service of the original Arbitral Award as there was no production of the Affidavit of Service. The applicant contends that there is only 1 copy of Final Arbitral Award filed in Court but the Arbitrator certified a copy each of the Final Arbitral Award to each of the parties which was filed with the application of 21<sup>st</sup> December 2018 and the Respondent was served and hence they filed Grounds of Opposition. The Applicant contends that on 25<sup>th</sup> July 2019, Counsel on record for the Respondent was served a copy of the Original Final Award before coming/proceeding in court. This Court relying on the court record could possibly know or determine the activities outside the court in receipt and filing of Final Arbitral Award. It was not part and parcel of the process of service and did not ask as the court file contained the Award.

The truth of the matter is that service of the Original Final Award on 22<sup>nd</sup> July 2019 is contested. This Court is/was not involved or party to filing of pleadings and submissions. The Court received the Court file with filed documents. It is assumed unless either party moves the Court that if each party is represented during proceedings of pleadings /documents that service is completed of all documents which was the case here until the delivery of the Court's Ruling of 15<sup>th</sup> November 2019.

Due to divergent and contested versions with regard to filing and service of the original Arbitral Award, it would not be legally possible or sound for this Court to venture into the review application process when/where the discovery of new and important information /facts are not verified but contested.

The issue of service is both a matter of law and fact and has to be determined on the basis of **Section 107-109 Evidence Act**; he who alleges must prove.

The Applicant filed Notice of Appeal on 20<sup>th</sup> November 2019 and sought typed proceedings and Ruling of 15<sup>th</sup> November 2019. A party has a legal right to lodge an appeal in compliance with the legal requirements or basis. This Court upon filing of an appeal of its orders is divested of jurisdiction to continue hearing and determination of any new issue. To do so would amount to the Court arrogating itself appellate jurisdiction to be exercised over its own orders. This Court will not stand in the way of the appeal process but allow the same to be dealt with in the Court of Appeal. This Court associates itself with the Court of Appeal case of **Pancras T. Swai –vs- Kenya Breweries Limited [2014]eKLR**, where the Court stated as follows at page 9 and 10 thereof;

*“It seems clear to us that the appellant, in basing his review application on the failure by the Court to apply the law correctly faulted the decision on a point of law. That was a good ground for appeal but not a ground for an application for review. If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are functus officio and have no appellate jurisdiction.”*

Also see the **Environment and Land case of Serephen Nyaani Menge –vs- Rispah Onsase[2018] eKLR** Mutungi J. stated;

*“Order 45 (2)[CPR]*

*A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for review.”*

**A proper reading of Section 80 of the Act and Order 45 Rules 1 and 2 [CPR]** makes it abundantly clear that a party cannot apply for review and appeal from the same decree or order.

Secondly, to conduct proceedings to confirm the issue of service of the original Arbitral Final Award would amount to tampering with the impugned Ruling the subject of appeal when this Court is already on notice of the impending appeal.

Thirdly, the Applicant submitted that filing Notice of Appeal is expression of intention to appeal until the record of appeal is filed there is no appeal. With respect, once the court is notified of either intention of processing of an appeal, or the actual appeal the Court must comply as the Court's bound by the Appellate Court orders, it ought to allow a party to pursue the appeal.

**c) Did the Court err in not stopping proceedings culminating to the Ruling of 15th November 2019 whilst an appeal had been lodged over the same matter?**

During the proceedings that culminated to the Ruling of 15<sup>th</sup> November 2019, the Court was informed of an appeal in **High Court Civil Appeal No E001 of 2018 Talewa Road Contractors Ltd vs Kenya National Highway Authority** and not **Nairobi Civil Appeal 246 of 2019** in the Court of Appeal. This Court referred to **E001 of 2018** but did not stop the proceedings as the appeal was not from orders by this Court. Secondly, the appeal though over the same subject matter was by a court of similar equal and competent jurisdiction, High Court and no stay of proceedings was sought. No mention or disclosure was made of the impending appeal **Nairobi Civil Appeal 246 of 2019** in the Court of Appeal during the proceedings.

## **DISPOSITION**

**1. The Application for review is dismissed, the parties & Counsel to pursue the impending appeal.**

**DELIVERED DATED & SIGNED IN OPEN COURT ON 23RD SEPTEMBER 2020 (VIDEO CONFERENCE)**

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

**PROF. ALBERT MUMMA & CO. ADVOCATES FOR RESPONDENT**

**MURIU, MUNGAI & CO. ADVOCATES FOR APPLICANT**

**COURT ASSISTANT: TUPET**